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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE UNITED STATES,

Petitioner,

vs.

CENTRAL EUREKA MINING COMPANY (a corporation), ALASKA-
PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARY-
LAND MINES CORPORATION, HOMESTAKE MINING COMPANY,
BALD-MOUNTAIN MINING COMPANY, ERMONT MINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

**BRIEF IN OPPOSITION OF RESPONDENTS HOME-
STAKE MINING COMPANY, CENTRAL EUREKA
MINING COMPANY (a corporation), ALASKA-PACIFIC
CONSOLIDATED MINING COMPANY and IDAHO
MARYLAND MINES CORPORATION**

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Opinions Below

The original opinion of the Court of Claims is printed at pages 1-50 of the Appendix to the Petition and is reported at 138 F. Supp. 281. The opinion denying the Government's motion for a new trial is printed at pages 123-130 of the Appendix to the Petition.¹

¹ The Appendix to the Petition will be referred to hereafter as "Pet. App."

Questions Presented

QUESTION No. 1:

The first question stated by the Petitioner is whether War Production Board Order L-208 resulted in a temporary taking of the respondents' right to mine gold (Pet. p. 2). The Petitioner prefaces its statement of the question with the assertion that Order L-208 was issued "In order to conserve scarce war materials and to bring about the voluntary relocation of skilled manpower to more vital mining activities" (Pet. p. 2).

The assertion that Order L-208 was issued "in order to conserve scarce war materials" disregards the Findings made by the Court of Claims on the principal issue below. That issue was whether, as contended by the Government, the Order was a regulation of the use of war materials and the shut-down of the mines was a mere consequential ~~result~~ result of such a regulation, or whether, as contended by the respondents, Order L-208 was not issued "in order to conserve scarce war materials" but involved a direct, intentional taking of the respondents' rights to mine gold in the unfounded hope that a transfer of manpower would result.

On this principal issue the Court of Claims found in favor of the respondents and against the Government. Specifically, the Court found (1) that orders of the War Production Board (hereinafter called "the WPB") issued many months before Order L-208 "had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment" (Finding 17, Pet. App. p. 62; see also Finding 50, Pet. App. p. 90), (2) that the "dominant consideration" in the issuance of the Order was the transfer of mine labor from the gold mines to mines producing other metals (Finding 46, Pet. App. p. 89) and (3) that, although the preamble to Order L-208

stated that it was issued to conserve critical materials, supplies and equipment, the Order was in fact not adapted to do so (Finding 48, Pet. App. p. 89-90). As the Court's opinion said, "The record establishes that no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines" (Pet. App. p. 8).

The question whether Order L-208 was issued "in order to conserve scarce war materials", as the Government contended below and suggests in the Petition, was predominantly a question of fact. It was decided in favor of the respondents by the Court of Claims, whose conclusion was supported by extensive Findings (see below, p. 12).

The legal conclusion drawn from the facts, that the WPB's direct, intended closing of the respondents' mines constituted a "taking" of the respondents' right to mine and sell their gold, involves no novel concept but, on the contrary, is fully supported by many decisions of this Court.

QUESTION No. 2:

The second question sought to be raised by the Petition is whether the WPB was authorized to effect the taking here involved (Pet. p. 2).

The Government did not attempt to raise this question in the Court of Claims until it made a motion for a new trial after the Court below had decided in the respondents' favor (Pet. App. p. 128).

In now raising the question, the Petition asserts that none of the statutes referred to by the Court below "in its original opinion" authorized a taking (Pet. p. 16, footnote 12). In the Appendix to this brief we quote the relevant portions of the three statutes which are mentioned in the Petition and also quote the other pertinent statutes and

Executive Orders which are listed in a footnote below.² These statutes and Executive Orders establish that the WPB had ample authority to take the respondents' property rights.

The Constitutional Provision, Statutes, Executive Orders and Regulations Involved.

The Fifth Amendment to the Constitution provides in part:

“* * * nor shall private property be taken for public use, without just compensation.”

As already stated, the pertinent statutes and Executive Orders dealing with the powers of WPB and other Governmental agencies are set forth in the Appendix hereto.

The Special Jurisdictional Act of July 14, 1952 (66 Stat. 605) provides:

² The statutes are as follows:

§ 120 of the National Defense Act of 1916, 39 Stat. 166, 213;

The Act of March 4, 1917, 39 Stat. 1192;

§ 9 of the Selective Training and Service Act of 1940, 54 Stat. 892;

The Act of October 10, 1940, 54 Stat. 1090;

The Requisitioning Act of October 16, 1941, 55 Stat. 742, as amended 56 Stat. 181;

Title II of the Second War Powers Act, 56 Stat. 177;

Title III of the Second War Powers Act, 56 Stat. 177-178.

The Executive Orders are the following:

Ex. Order 8629, 6 F.R. 191

Ex. Order 8875, 6 F.R. 4483

Ex. Order 8942, 6 F.R. 5909

Ex. Order 9024, 7 F.R. 329

Ex. Order 9040, 7 F.R. 527

Ex. Order 9125, 7 F.R. 2719

Ex. Order 9138, 7 F.R. 2919

"The United States Court of Claims be, and hereby is, given jurisdiction to hear, determine and render judgment, notwithstanding any statute of limitations, laches, or lapse of time, on the claim of any owner or operator of a gold mine or gold placer operation for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions imposed by War Production Board Limitation Order L-208 during the effective life thereof: *Provided*, That actions on such claims shall be brought within one year from the date this Act becomes effective."³

The text of Order L-208 is set out in the Findings of Fact (Pet. App. p. 86-88).

STATEMENT

The origin, promulgation and general effect of Order L-208 are the subject of 52 Findings of Fact which will be found at pages 51-94 of the Appendix to the Petition. The other Findings relate severally to the respective plaintiffs below.

³ The respondents here had filed their petitions in the Court of Claims prior to the enactment of the quoted statute. However, the respondents argued below that, if for any reason the Court might hold that the issuance of Order L-208 had not amounted to a "taking", the Court was still authorized by the Congress to render a judgment in favor of any gold mine owner which could prove that it had incurred losses because of the closing of its mine as a result of the issuance of Order L-208. The majority opinion adverts to this (Pet. App. p. 2-3) but, since the Court found that the issuance of the Order effected a taking, the Court held that it was unnecessary to determine the effect of the Special Jurisdictional Act (Pet. App. p. 46).

There has been no decision in this or any other case that the Special Jurisdictional Act has the limited effect suggested in footnote 14 to the Petition (p. 18). Indeed, the Court of Appeals for the Ninth Circuit recently held that the Congress, in enacting the Special Jurisdictional Act, elected to compensate operators of the gold mines affected for all losses caused by Order L-208. *Brinker-Johnson Co. v. Reconstruction Finance Corporation*, 236 F. 2d 195, 197, 198.

As the Government's Statement explicitly acknowledges (Pet. p. 4-5), seven months before the issuance of Order L-208 "the War Production Board had effectively eliminated the possibility of acquisition by the gold mines of critical materials or supplies" (Findings 17, 48, 50, Pet. App. p. 62, 89, 90).

In the summer of 1942 the WPB, War Manpower Commission and War Department began to be alarmed by the growing exodus of workers from the strategic metal mines, principally copper mines (Findings 18, 19, 20, 21, Pet. App. p. 62-65). Investigation of this loss of miners disclosed (1) that the miners were being attracted by higher wages and better working conditions available in the aircraft and shipbuilding industries and in the Armed Services building construction projects, (2) that many experienced miners were being drafted into the Armed Services instead of being deferred by the Selective Service as essential workers, and (3) that production was also hampered by the low morale of the miners, the short workweek in the mines and the lack of any effective means of recruiting workers (*id.*).

In July, 1942, a War Department Committee suggested that production of gold be curtailed and a program be established for the transfer of gold mine workers to the nonferrous metal mines (Finding 19, Pet. App. p. 63). More or less simultaneously the Labor Production Division of the WPB made a similar suggestion (Finding 20, Pet. App. p. 64, 65).

The proposal to close the gold mines in the hope of diverting hard rock miners to nonferrous mines was the subject of vigorous debate within and without the WPB from early in August, 1942 until Order L-208 was issued on October 8, 1942. Among other things, it was questioned whether a shutdown of the gold mines would be effective to bring about the voluntary transfer of a significant number of hardrock miners to the nonferrous metal mines. Findings 22 to 38, both inclusive, set forth in detail

that took place between the beginning of August and October 2, 1942, when the Under Secretary of War wrote the Vice Chairman of the WPB a letter which is referred to later (Pet. App. p. 65-83). Those Findings contain the texts of several contemporary memoranda and they afford abundant support for the statement in the opinion below that (Pet. App. p. 8):

“The record establishes that no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines.”

By mid-September, 1942, strong opposition to the issuance of a gold mine closing order was being heard from important voices within the WPB (Findings 31, 36, 38, Pet. App. 79, 82, 83). However, at this point the Army started to bring great pressure to bear on the WPB to close down the gold mines (Pet. App. p. 7). By September 15 the War Department was “impatient at the delay” in issuing a closing order (Finding 30, Pet. App. p. 78). At a meeting of WPB officials and gold mine representatives on October 1, when the gold mine owners expressed numerous reasons why their mines should not be closed, several WPB officials in attendance “questioned the possible effectiveness of the proposed order”, but the representative of the Army spoke strongly in support of a closing order”. (Finding 36, Pet. App. p. 82.)

On October 2, 1942, the Under Secretary of War wrote to the Vice Chairman of the WPB urging immediate issuance of a gold mine closing order and saying “The matter has hung fire for some time, and I trust that there will be no further delay” (Finding 39, Pet. App. p. 83-84). In the letter he offered to give approval of the Order on behalf of the War Department and indicated that he could secure the approval of the Navy Department (*id.*).

The next day, October 3, the Chief of the Mining Branch of the WPB, who had undertaken at the October 1 meeting to "determine how many miners and muckers would actually be released by a closing order" (Finding 36, Pet. App. p. 81-83), reported to the Vice Chairman of the WPB "that if all the gold mines and dredges in the United States were put on a stand-by basis, it would make available only about 600 miners and muckers for other mining enterprises 'provided they [could] all be induced to go into other mines'" (Finding 37, Pet. App. p. 83). The estimated 600 represented only a small fraction of the numbers previously estimated within the WPB (Findings 20, 25, 27, 36, 40, Pet. App. p. 64, 69, 72, 82, 84) and there was no reason to expect that anything like all of the 600 could be induced to go into other mines (Finding 50, Pet. App. p. 90).

This was one of the bases for the Finding made by the Court below that "in issuing L-208 WPB acted without any justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines" (Finding 51, Pet. App. p. 91). This Finding of the Court of Claims was supported by an earlier Finding, setting forth in detail facts known to the WPB which made it unreasonable to expect that the Order would bring about the transfer of a significant number of hardrock miners to the nonferrous metal mines (Finding 50, Pet. App. p. 90).

Nevertheless, the forces which led to the issuance of Order L-208 continued to gather momentum. On October 5 the Under Secretaries of War and the Navy sent a memorandum to the Chairman of the WPB which opened with the statement that "The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production". The memorandum closed with the statement "The matter has

hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided" (Finding 40, Pet. App. p. 84).

On the next day, October 6, 1942, the War Production Board formally met and approved the issuance of Order L-208.⁴ The Commanding General of the Services of Supply told the Board that in view of the fact that "the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines * * * failure to stop gold production immediately would be inexcusable" (Finding 41, Pet. App. p. 85).⁵

On October 8, 1942, the WPB issued Order L-208 "in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines" (Pet. App. p. 8) and "without any justifiable anticipation that the order

⁴ Among the Board and staff members present at this meeting were Chairman Donald Nelson; Vice President Wallace, Chairman, Board of Economic Warfare; Under Secretary of War Patterson "acting for Mr. Henry L. Stimson, Secretary of War", and Vice Admiral Robinson "acting for Mr. Frank Knox, Secretary of the Navy"; Lt. General Knudsen, Director of Production, War Department; Mr. Isador Lubin "acting for Mr. Harry L. Hopkins, Special Assistant to the President supervising the Defense Aid Program"; and Mr. John Lord O'Brian, General Counsel of the Board. Among those present by invitation were Lt. General Somervell, Commanding General, Services of Supply, War Department; Chairman Paul V. McNutt of the War Manpower Commission; and Mr. Robert R. Nathan, Chairman of WPB's Planning Committee (Pltfs. Ex. 92).

⁵ In a report which the Policy Analysis and Records Branch of WPB submitted in May, 1944, concerning the history and effect of Order L-208, it was stated that "General Somervell's position * * * amounted almost to an ultimatum which permitted no alternative" (Pltfs. Ex. 1, p. 46).

The Petition states that the Army's decision to furlough 4,000 men for work in the copper mines was "an action the Army had not been willing to institute so long as the gold mines continued in operation" (Pet. p. 6). Actually, the findings show that the Army had determined to furlough these soldiers prior to the WPB's decision to issue Order L-208 (Findings 40, 41, Pet. App. p. 84-85). The Court below characterized the Army's objection to the continued operation of the gold mines as "largely political rather than practical" (Pet. App. p. 7).

would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines" (Finding 51, Pet. App. p. 91).

Paragraph (b)(1) of the Order provided (Pet. App. p. 86):

"(1) On and after the issuance date of this order, each operator of a nonessential [gold] mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine."

Paragraph (i) of the Order provided (Pet. App. p. 87-88):

"(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. * * *"

The Order thus deprived the respondents directly of their right to extract gold from their mines and sell it, under penalty of fine or imprisonment.

While the preamble contained a reference to "a shortage in the supply of critical materials for defense" and the Order contained certain provisions relating to "any material, facility or equipment" (Pet. p. 5-6; Pet. App. p. 86), the Court of Claims held (Pet. App. p. 29):

"Despite its preamble and the authority cited for its issuance, the language of the order itself and the circumstances surrounding its issuance indicate that neither its purpose nor its effect was to conserve or allocate critical materials, equipment and facilities needed for defense, but was rather to deprive the gold mine owners of their right to make profitable use of their gold mines."

This holding in the Court's opinion was based on its Finding 48 (Pet. App. p. 89-90).

On October 10, 1942, two days after the Order was issued, 21 United States Senators wrote the President of the United States urging that the President "stay" Order L-208 (Finding 52, Pet. App. p. 91-93). The President did not stay the Order and it was not rescinded until June 30, 1945 (Finding 90, Pet. App. p. 102).

Following the issuance of the Order only an insignificant number of hardrock miners actually went to work in the nonferrous metal mines (Findings 47, 52; Pet. App. p. 89, 94). The Petition concedes this (p. 6). In March, 1944, officials of the WPB agreed "that the number of gold mine workers who went into other mines and remained there for a year or more was not over 100" (Finding 52, Pet. App. p. 94).

Upon the basis of the facts so found, the Court below determined that Order L-208 was not "a *bona fide* limitation order" (Pet. App. p. 20-23), and held that (Pet. App. p. 23):

"L-208 was aimed, in all its provisions, directly at the beneficial use of the mining properties of the gold mine owners, and the only intention reasonably inferrible from the language of the order itself and the circumstances surrounding its issuance was an intent to temporarily deprive them of that property right."

In holding that the Order was not in fact a "regulation", the Court said (Pet. App. p. 13):

"What the order did do, and do directly, was to prohibit the continued operation of the gold mines".

It concluded that the closing of the gold mines was not the incidental or consequential result of a regulation dealing with the allocation or conservation of critical materials but was the direct, intended result of the Order, and that therefore the action constituted a "taking" within the meaning of the Fifth Amendment (Pet. App. p. 23, 32-33).

ARGUMENT

I.

Based on a very full record of the circumstances leading to the issuance of Order L-208 and a careful analysis of the Order itself, the Court of Claims found that the shut-down of the respondents' mines was not a mere incidental result of a bona fide regulation of the use of critical materials and that the Order effected a "taking".

The Court's decision was not inconsistent with its prior decisions in *Oro Fino Consolidated Mines, Inc. v. United States*, 118 C. Cls. 18, certiorari denied, 341 U. S. 948, and *St. Regis Paper Co. v. United States*, 110 C. Cls. 271, certiorari denied, 335 U. S. 815.

The question whether Order L-208 was issued in order to conserve war materials and the shut-down of the respondents' mines was a mere consequential result of a regulation of the use of war materials, as the Government contended, or whether the Order involved a direct taking of the respondents' right to mine gold in the hope that a transfer of manpower would result, as the respondents contended, was predominantly a question of fact.

At extensive hearings a comprehensive record was made of the circumstances leading to the issuance of Order L-208. After considering that record and very full briefs, and after hearing oral argument, the Court below made 52 Findings which set forth the story of Order L-208 in detail; they take up 43½ pages of the Appendix to the Petition (Pet. App. p. 50-94). Those Findings and the Court's analysis of Order L-208 itself (Pet. App. p. 20-23) fully sustained the respondents' contention.

The Court of Claims did not base its holding upon the ground that "Order L-208 went beyond the bounds of permissible regulation", as the Government now contends (Pet. p. 7). Rather the Court held that, "What the order did do, and do directly, was to prohibit continued operation of the

gold mines" (Pet. App. p. 13) and thus constituted a "taking" as distinguished from a regulation (see Pet. App. p. 16-17, 23 and Point II at p. 15-19 below).

The principal ground for the issuance of a writ of certiorari advanced in the Petition (p. 8-12) is that the decision of the Court of Claims is inconsistent with its prior decisions in *Oro Fino Consolidated Mines, Inc. v. United States*, 118 C. Cls. 18, certiorari denied, 341 U. S. 948, and *St. Regis Paper Co. v. United States*, 110 C. Cls. 271, certiorari denied, 335 U. S. 815.

Even if the asserted inconsistency existed, it would not appear to call for action by this Court under Rule 19. However, we submit that there is no inconsistency.

Oro Fino involved Order L-208 and the Court of Claims dismissed the petition on the Government's demurrer. However, the *Oro Fino* petition did not allege any facts showing that the Order had no relation to the allocation or conservation of critical materials. No "taking" was alleged, the property right involved was not described, and the plaintiff did not seek to recover the value of the property taken (compare *United States v. Causby*, 328 U. S. 256, 267). On the meagre allegations of the *Oro Fino* petition the Court of Claims viewed the closing of the *Oro Fino* mine as merely an incidental result of a valid exercise of the WPB's power to allocate critical materials; and in opposing *Oro Fino's* petition for a writ of certiorari the Government described Order L-208 as an exercise of the President's "wartime authority to allocate critical material and facilities" (Brief for the United States in Opposition, No. 667, October Term, 1950, p. 2, 6, 7).

As indicated in the opinion below (Pet. App. p. 14-15), the order in the *St. Regis* case (Order M-251) was of a very different nature. The preamble of the Order stated that there was a shortage of pulpwood needed for defense purposes. Order M-251 provided that the WPB's Director General could declare certain localities to be

shortage areas and could allocate the available supply away from and to specific persons; that he could direct the holders to make their supplies of pulpwood available for disposition; and that no one in that area might acquire or process any pulpwood except as the Director General might order. As a result of the application of the Order to the Puget Sound area where the St. Regis plant was located and the consequent inability of the St. Regis plant to process pulpwood, that plant was compelled to close down. The Court of Claims in effect held that any loss to St. Regis was consequential, and was the indirect result of an order dealing in fact with the allocation and conservation of critical supplies. The Court said (110 C. Cls. at 279):

“This does not mean, however, and the petition does not purport to so charge, that it was the Board’s objective to shut down plaintiff’s plant. It did not issue its General Preference Order No. M-251 to accomplish such an end.”

Here, on the other hand, the direct, intended result of Order L-208 was to shut down the respondents’ gold mines. Clearly, therefore, the decision in *St. Regis* offers no parallel to the instant case.⁶

⁶ The Government contends (Pet. p. 11) that even without the shutdown requirement Order L-208 would have resulted in the closing of the gold mines because of other provisions preventing the mine operators from acquiring or using “any material, facility, or equipment” (Pet. App. p. 86). The Court of Claims found that the latter provisions were not directed at the allocation or conservation of critical materials (indeed they were not even limited to the acquisition or use of “critical” materials) but were inserted as “part and parcel of the express order to cease doing business” (Pet. App. p. 33; Finding 48, Pet. App. p. 89-90).

II.

Order L-208 directly deprived each of the respondents of valuable property—the right to produce and sell gold from its mine over a period of two and one-half years.

In determining whether there was a compensable taking it is immaterial that the Government did not itself operate the mines or effect a physical entry.

The “property” of each of the respondents, within the meaning of the Fifth Amendment, was not limited to the “physical thing”, i. e., the mine. The right to produce gold from the mine and sell it was itself property. The right to do so over a period of two and one-half years was a very substantial property right.

The opinion below correctly held (Pet. App. p. 10):

“The property which plaintiffs contend has been taken from them, and which defendant urges was merely limited in its usefulness to plaintiffs as a consequence of a valid regulation of scarce materials; was plaintiffs’ right to make profitable use of their gold mining properties. As pointed out by Mr. Justice ROBERTS in *United States v. General Motors Corporation*, 323 U. S. 373, while ‘property,’ as that term is used in the Fifth Amendment certainly means the physical thing with respect to which the citizen exercises rights recognized by law, it also means the group of rights inhering in the citizen’s relation to the physical thing, as the rights to exclusively possess, use and dispose of the physical thing. In this sense, the right of a gold mine owner to extract gold from his mine and to sell it for a profit, is a property right protected by the Constitution. *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393.”

The Government argues that the respondents are not entitled to compensation because “there was no affirmative use or invasion of the mines by the Government, nor was ownership or possession transferred to the Government” (Pet. p. 12). But under this Court’s decisions it is clearly immaterial that when the Government deprived the re-

spondents of their property, the right to mine and sell gold, the Government did not itself make any "affirmative use" of the right of which the respondents were deprived. It is equally immaterial that there was no physical "invasion of the mines by the Government" and that ownership was not transferred to the Government.

In *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 414, cited by the Court below, Mr. Justice HOLMES wrote for the Court that

"As said in a Pennsylvania case: 'For practical purposes, the right to coal consists in the right to mine it.' *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

In *United States v. General Motors Corp.*, 323 U. S. 373, also cited by the Court below, Mr. Justice ROBERTS enunciated for this Court, at pages 377-378, the concepts which were summarized in the opinion below (Pet. App. p. 10; see above, p. 15) and also said (p. 378):

"The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

The *General Motors* opinion cited *United States v. Welch*, 217 U. S. 333, and *Richards v. Washington Terminal Company*, 233 U. S. 546. In *U. S. v. Welch* compensation was awarded when the flooding of land by the Government rendered an easement over land ineffectual. *Richards v. Washington Terminal Company* was an action brought by

the owner of a house near a portal of a terminal which the Washington Terminal Company had built by authority of Acts of Congress and from which there was a continuing emission of gases and smoke because of the operation of trains in the tunnel. In reversing a judgment in favor of the defendant this Court said (p. 557): "Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him."

In *United States v. Causby*, 328 U. S. 256, the Court held that flights of aircraft over a dwelling and chicken farm near a military airport, which were so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land, were as much an appropriation of the use of the land as a more conventional entry upon it. Mr. Justice DOUGLAS said for the Court (p. 261, 262):

"* * * the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States v. Miller*, 317 U. S. 369 * * *. If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."

"The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed."

Kimball Laundry Co. v. United States, 338 U. S. 1, involved the condemnation of a laundry for use by the Army for a temporary period. The Laundry Company had developed valuable "trade routes", which, of course, neither the Company nor the Army could use while the Army was operating the laundry. In discussing the question whether the Government had to compensate the Laundry Company for the value of the use of the trade routes, Mr. Justice FRANKFURTER wrote for the Court (p. 13):

"* * * the situation is apt for the oft-quoted remark of Mr. Justice HOLMES, 'the question is what has the owner lost, not what has the taker gained.' *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195."

The Court's decision (p. 16) was "that since the Government for the period of its occupancy of petitioner's plant has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferable value their temporary use may have had".

In *William C. Atwater, Jr., et al. v. United States*, 106 C. Cls. 196, the plaintiffs were the owners of certain property on Fire Island. The military authorities built a target range near the plaintiffs' property and established a safety zone which included the plaintiffs' property and from which all persons, including the plaintiffs, were excluded during the Government's use of the target range from December, 1941 until June 30, 1944. Although there was no "affirmative use or invasion" of the plaintiffs' property, the Court of Claims held that there was a compensable taking because the plaintiffs were denied access to their property (p. 206, 207).

In *Edward P. Stahel & Co., Inc. v. United States*, 111 C. Cls. 682, certiorari denied, 336 U. S. 951, the WPB had issued a directive requiring certain owners of raw silk to hold their silk subject to Government direction. The Court of Claims held that the issuance of the directive itself

effected a taking even though at the time the directive was issued the Government did not take physical possession of the silk or require the owners of the silk to surrender such possession.

The "taking" of the respondents' rights to operate their gold mines under Order L-208 was as clear and direct as the taking in any of the cases cited above.

Indeed, the taking of the respondents' property was just as complete as if the Government had stationed soldiers at each of the mines to enforce compliance with Order L-208. The entire Executive arm of the Government appeared to be behind the Order and the posting of soldiers would have added little, if anything.

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There is no basis for the Government's argument (Pet. p. 12) that "since there was as much gold in the mine when Order L-208 was revoked as when it was issued, the effect of the Order was simply to suspend until after the war the extraction of the gold". An owner of a gold mine has the same right to a profitable use of his property as the owner of a farm or factory. If the Government deprives the owner of a farm or factory of the right to use his property, it is no answer to a suit for compensation to say that the Government later returned the farm or factory in as good condition as when it was taken.

IH.

The Court below did not pass upon the respondents' alternative ground for a recovery, viz., that Order L-208, if viewed as a regulation, constituted a taking because it was arbitrary.

The Government argues that this case does not fall "within the very limited category of takings" resulting from a regulation which "interferes too severely or extensively" with property rights and in this connection

refers to *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (Pet. p: 13).

The Government thus takes cognizance of an *alternative* ground for recovery which the respondents advanced in the Court of Claims but on which that Court did not pass. In support of that alternative ground the respondents cited *Chicago, Burlington & Quincy Railway Co. v. People of the State of Illinois, ex rel. Drainage Commissioners*, 200 U. S. 561, 593-594, and *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415-416.

The Court's opinion below summarized the first and second grounds advanced by the respondents for a recovery (Pet. App. p. 9):

"Plaintiffs contend that L-208, while in form a regulation restricting their acquisition and use of critical materials needed for defense, was in substance a requisition or taking, for the life of the order, of plaintiffs' right to make profitable use of their gold mining properties for which taking the Government is liable to pay just compensation under the Fifth Amendment to the Constitution. Plaintiffs also contend that if the court should decide that L-208 was actually a regulation in substance as well as in form, it was arbitrary in that it went far beyond what was required by the exigencies of the war situation existing at the time of its issuance, bore no reasonable relation to its ostensible purpose of conserving critical materials needed in the defense effort, and in fact and law amounted to a taking of valuable property rights of plaintiffs for which just compensation should be paid."

The Court sustained the respondents on the first ground (Pet. App. p. 23, 32-33) and hence found it unnecessary to pass on the second, or alternative, ground.

The Government's discussion of this question in its Petition (p. 13-15) tends to suggest that this Court ought to review a question which the Court below did not find it necessary to decide.

While, as the Petition points out (p. 14, footnote 11), the Court of Claims held that the issuance of Order L-208 was "arbitrary" (Pet. App. p. 28-29), that holding was not made in connection with the respondents' alternative ground for recovery but rather in connection with the Government's contention below that, if the Order was arbitrary, it was unauthorized (Pet. App. p. 23-29).

However, the Government now insists that the Order was not arbitrary and urges that the prospects of the Order's success "justified the War Production Board's action" (Pet. App. p. 15, footnote 11).⁷ The Findings of the Court below dispose of this argument conclusively (see above, p. 8, 9-10, 11).

* * * *

This case bears no resemblance to cases cited in the Petition (p. 14) involving wartime rent controls (*Woods v. Miller*, 333 U. S. 338; *Bowles v. Willingham*, 321 U. S. 503; *Block v. Hirsh*, 256 U. S. 135), regulation of commodity prices (*Yakus v. United States*, 321 U. S. 414; *Morrisdale Coal Co. v. United States*, 259 U. S. 188), renegotiation of war profits (*Lichter v. United States*, 334 U. S. 742), allocation of critical materials (*L. P. Stewart & Bros., Inc. v. Bowles*, 322 U. S. 398), or the incidental frustration of contract rights (*Omnia Commercial Co. v. United States*, 261 U. S. 502). In all of those cases the injury, usually of only a limited nature, was merely the *indirect* effect of reasonable and legitimate action taken to promote the public good.

⁷ In the same footnote 11, the Government cites *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 for the proposition that, if the Order was arbitrary, respondents should have sought an injunction against its enforcement, not compensation for damages. The cited case simply does not stand for the Government's proposition and it has never been the law that the possible availability of a remedy in equity defeats a remedy at law. This Court has explicitly held that the availability of an injunction against a taking does not defeat an action at law for just compensation, *United States v. Great Falls Manufacturing Company*, 112 U. S. 645, 656.

The wartime prohibition cases (*Ruppert v. Caffey*, 251 U. S. 264; *Hamilton v. Kentucky Distilleries and Warehouse Company*, 251 U. S. 146), also cited in the Petition (p. 14), present no analogy, for reasons pointed out in the opinion below (see Pet. App. p. 30-31).

IV.

There is no occasion for this Court to provide "more authoritative guidance which will be useful in current planning for future periods of stress, as well as in the actual operation of controls in times of emergency".

The Government argues that this Court should grant certiorari so that there may be "more authoritative guidance which will be useful in current planning for future periods of stress, as well as in the actual operation of controls in times of emergency" (Pet. p. 18). It says also that "a more definitive delineation between 'regulation' and 'taking' is needed as a guide for use in the current and continuing preparation for possible future national or war emergencies" (p. 8).

The Findings of the Court of Claims (Pet. App. p. 50-94) indicate the *sui generis* nature of the drastic, unprecedented—and never repeated—action taken by the WPB in depriving those owners of gold mines who were not exempted from Order L-208 of their right to mine gold by directly ordering them, under penalty of fine or imprisonment (Pet. App. p. 87-88), "to take all steps as may be necessary to close down" the operation of their mines (Pet. App. p. 86)—an action which was taken in the hope that skilled labor in the mines would move to other mining activities.

There is no reason to suppose that anything like Order L-208 will ever be repeated. There was nothing like it prior to World War II, there was nothing else like it during World War II, and it is inconceivable that "current planning for future periods of stress" will or should embrace anything remotely similar.

V.

It was not until after the decision of the Court of Claims that the Government argued for the first time, on its motion for a new trial, that there was a lack of authority to take the respondents' property.

The WPB had ample authority to issue Order L-208.

The Petition argues "that (1) the War Production Board did not have the authority to requisition property in circumstances such as are here involved and (2) the Board did not intend, nor did it purport, to exercise any requisitioning authority that it had" (Pet. p. 15-16).

This ground for denying the respondents compensation was not advanced by the Government until after the Court of Claims' decision on February 20, 1956 in favor of the respondents; the ground was the basis for the Government's motion for a new trial (Pet. App. p. 29-30, 128). That motion was denied on July 12, 1956 (Pet. App. p. 123-130).

In view of the tardiness with which the Government has urged that there was no authority for it to take what it in fact did take, the language of Mr. Justice HOLMES for the Court in *International Paper Company v. United States*, 282 U. S. 399, 406, seems particularly apt:

"The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary [of War] was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that, if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has

had. The doubt is rather late. We shall accept as sufficient answer the reference of the petitioner to the National Defense Act * * * [39 Stat. 166, 213], giving the President in the time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation."

In the *International Paper* case, the Secretary of War by telegraphic order requisitioned the water power used by the plaintiff. In this case, Order L-208 was issued with the unanimous approval of all members of the WPB who were present at the Board's meeting of October 6, 1942, and those participating at that meeting in the decision to issue the Order included Vice President Henry Wallace, Under Secretary of War Patterson "acting for Mr. Henry L. Stimson, Secretary of War", Vice Admiral Robinson "acting for Mr. Frank Knox, Secretary of the Navy", Lieutenant General Knudsen, Director of Production, War Department, Lieutenant General Somervell, Commanding General Services of Supply, War Department, and Mr. Isador Lubin, "acting for Mr. Harry L. Hopkins, Special Assistant to the President" (see footnote 4, p. 9, above).

Not only was the order issued at the insistence of the War and Navy Departments (Findings 39, 40, Pet. App. p. 83-84) but it was brought to the attention of the President himself when 21 United States Senators urged him to "stay" the Order; the President did not do so (Finding 52, Pet. App. p. 91-93).

If ever the full power of the Executive arm of this Government was brought to bear in a taking of property, it was done in this instance.

The petitioner's narrow argument appears to be that the power to requisition the precise type of property taken in these cases was not explicitly conferred upon the WPB (Pet. p. 15-17). Actually, as the Court of Claims found, by October, 1942 the Congress had conferred upon the Presi-

dent authority to requisition any real or personal property or interest therein which he deemed necessary successfully to prosecute the war and all of these powers, except the power to condemn real property, had been explicitly delegated to the WPB (Pet. App. p. 3, 29).^a

^a The relevant statutes and Executive Orders are collected in the Appendix to this brief (referred to in this footnote as "App.>").

The President was authorized to place mandatory orders with a company for any product or material required "of the nature and kind usually produced or capable of being produced by such . . . company," and to take over the company's plant upon its refusal to comply with any such order (Section 120 National Defense Act of 1916, 39 Stat. 166, 213, App. p. i). This was the statutory authority deemed sufficient by this Court in the *International Paper* case and the President's powers under this statute were delegated to the WPB (Ex. Order No. 9040, App. p. xix, xx).

Section 9 of the Selective Training and Service Act of 1940 (54 Stat. 892, App. p. iii) was substantially identical with the foregoing section of the National Defense Act of 1916, except that it authorized the President to act "through the head of the War Department or the Navy Department". The President's powers under this Act were also delegated to the WPB (Ex. Orders No. 8629 and 9040, App. p. xii, xiii; xx).

The Requisitioning Act of October 16, 1941 (55 Stat. 742, App. p. vi) authorized the President to requisition military or naval equipment, supplies, munitions, machinery, tools or materials necessary for the manufacture of such equipment and these powers too were delegated to the WPB (Ex. Orders No. 8942 and 9040, App. p. xvi, xx).

Title III of the Second War Powers Act (56 Stat. 177, App. p. x, xi) provided that

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The President's powers under the foregoing statute were similarly delegated to the WPB (Ex. Order No. 9125, App. p. xxi).

The Act of March 4, 1917, 39 Stat. 1192 (App. p. ii) authorized the President to requisition "any factory, or any part thereof without taking possession of the entire factory" and the word "factory" was defined to include "any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard".

Title II of the Second War Powers Act (56 Stat. 177, App. p.

Of the various laws embraced in this broad statutory scheme, perhaps the most significant is Title II of the Second War Powers Act. It is clear that under that and the other related statutes and Executive Orders, all referred to in footnote 8, there was ample authority to take the gold mines or any "interest therein".

Moreover, the WPB's action was taken at the instance of and approved by the War and Navy Departments (Findings 30, 36, 39, 40, 41, 42, Pet. App. p. 77-78, 81-85; Pltfs. Ex. 92; see above p. 7, 10, 24) and substantially ratified by the President himself (Finding 52, Pet. App. p. 91-94; see above p. 11, 24).

The Government's present contention that the WPB acted without authority is a complete reversal of the position taken by the Government in the Supplemental Brief which it filed in the Court of Claims after argument below. On the oral argument below the Government insisted that the respondents were not entitled to compensation because the shutdown of their mines was required by a "valid" regulation, and in its Supplemental Brief the Government undertook to establish the validity of Order L-208 by showing that there had been a Congressional ratification of the WPB's action in issuing the Order.

To show that there had been such a ratification the

ix) authorized the Secretary of War, the Secretary of the Navy "or any other officer, board, commission or governmental corporation authorized by the President" to acquire "any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that should be deemed necessary for military, naval or other war purposes".

While these powers under the two last-mentioned statutes were not specifically delegated to the WPB, Executive Order No. 9024 (7 FR 329, App. p. xix) gave the Chairman of the WPB the power to "Determine the policies, plans, procedures and methods of the several Federal departments, establishments and agencies in respect to war procurement and production, including purchasing * * * [and] requisitioning * * * and issue such directives in respect thereto as he may deem necessary or appropriate".

Government established that the Congress had enacted legislation relating to the suspension of the requirements of annual assessment work on mining claims with knowledge of the prior issuance of Order L-208 and giving effect thereto (57 Stat. 74, House Report 351, 75th Congress, 1st Session, 89 Cong. Rec. 3758).⁹

The Government complains, lastly, that the Court of Claims "ignored" the fact that "the Board did not intend, nor did it purport, to exercise any requisitioning authority that it had" (Pet. p. 16). This argument was fully disposed of in the opinion of the Court of Claims denying the Government's motion for a new trial (Pet. App. p. 125-127, 129).

CONCLUSION

For the most part this case involved issues of fact which were resolved by the Court of Claims in respondents' favor. There is no conflict between the decision below and any decision of this Court or of any Court of Appeals. On the contrary, the legal conclusions which flow from the facts as found are in accord with numerous decisions of this Court.

⁹ In its Supplemental Brief, the heading of the Government's first point was this:

"Congressional ratification of WPB's action in issuing L-208"

Under that heading the Government urged that the Congress had "recognized Limitation Order L-208 as an existing legal fact, and adopted subsequent legislation in the light of it" (p. 2). The presentation of this point concluded by stating that (p. 5):

"We thus have clear Congressional recognition of L-208."

The argument in the brief was that any possible legal deficiency in the authority for Order L-208 was remedied by the "clear Congressional recognition", i. e., by Congressional ratification. Compare *Shoshone Tribe of Indians v. United States*, 299 U. S. 476, 495-496.

It is respectfully submitted that the Government's petition for a writ of certiorari should be denied.

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APPENDIX

The Statutes

(In Chronological Order)

1. Section 120 of the National Defense Act of 1916, 39 Stat. 166, 213, pertinent provisions.

"The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

"Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture

the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$50,000.

“The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just.”

2. The Act of March 4, 1917, 39 Stat. 1192, pertinent provisions.

“(a) That the word ‘person’ as used in paragraphs (b), (c), next hereafter shall include any individual, trustee, firm, association, company, or corporation. The word ‘ship’ shall include any boat, vessel, submarine, or any form of aircraft, and the parts thereof. The words ‘war material’ shall include arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production, thereof. The word ‘factory’ shall include any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any

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shipyard or dockyard. The words 'United States' shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

"(b) That in time of war * * * the President is hereby authorized and empowered, in addition to all other existing provisions of law:

• • • • •
"FOURTH. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

"(d)¹ That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b) of this section, it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

3. Section 9 of the Selective Training and Service Act of 1940, 54 Stat. 892.

"The President is empowered, through the head of the War Department or the Navy Department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organ-

¹ This should be "(c)".

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ized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

“Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition or parts of ammunition, or any necessary supplies or equipment for the Army or Navy, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War or the Secretary of the Navy shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War or the Secretary of the Navy, or who shall refuse to furnish such arms, ammunition, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War or the Secretary of the Navy, as the case may be, then, and in either such case, the President, through the head of the War or Navy Departments of the Government, in addition to the present authorized methods of purchase or procurement, is hereby authorized to take immediate possession of any such plant or plants, and through the appropriate branch, bureau, or department of

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the Army or Navy to manufacture therein such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and a fine not exceeding \$50,000.

"The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just: *Provided*, That nothing herein shall be deemed to render inapplicable existing State or Federal laws concerning the health, safety, security, and employment standards of the employees in such plant.

"The first and second provisos in section 8(b) of the Act entitled 'An Act to expedite national defense, and for other purposes', approved June 28, 1940 (Public Act Numbered 671, Seventy-sixth Congress), are hereby repealed."

4. The Act of October 10, 1940, 54 Stat. 1090.

"That whenever the President determines that it is necessary in the interest of national defense to requisition and take over for the use or operation by the United States or in its interest any military or naval equipment or munitions, or component parts thereof, or machinery, tools, or materials, or supplies necessary for the manufacture, servicing, or operation thereof, ordered, manufactured, procured, or possessed for export purposes, the exportation of which has been denied in accordance with the provisions of section 6 of the Act approved July 2, 1940 (Public, Numbered 703, Seventy-sixth Congress), he is hereby authorized and empowered to requisition and take over for the said use or operation by the United States, or in its interest, any of the foregoing articles or materials, and to sell or otherwise dispose of any such articles or materials, or any portion thereof, to a person or a corporation of the United States whenever he shall determine such action to be in the public interest. Any moneys received by the

United States as the proceeds of any such sale or other disposition of any such articles or materials or any portion thereof shall be deposited to the credit of that appropriation out of which was paid the cost to the Government of the property thus sold or disposed of, and the same shall immediately become available for the purposes named in the original appropriation: *Provided, however*, That nothing in this section shall modify or repeal section 14 of Public Law Numbered 671, 76th Congress, approved June 28, 1940.

"Sec. 2. Whenever the President shall requisition and take over any article or material pursuant to the provisions of this Act, the owner thereof shall be paid as compensation therefor such sum as the President shall determine to be fair and just. If any such owner is unwilling to accept, as full and complete compensation for such article or material, the sum so determined by the President, such owner shall be paid 50 per centum of the sum so determined by the President and shall be entitled to sue the United States for such additional sum as, when added to the sum already received by such owner, such owner may consider fair and just compensation for such article or material, in the manner provided by sections 41 (20) and 250, title 28, of the Code of Laws of the United States of America: *Provided*, That recovery shall be confined to the fair market value of such article or material, without any allowance for prospective profits, punitive or other damages.

"Sec. 3. The authority granted in this Act shall terminate June 30, 1942, unless the Congress shall otherwise provide."²

5. The Act of October 16, 1941 (sometimes called the Requisitioning Act), 55 Stat. 742.

"That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use

² Such authority was extended to June 30, 1945; 56 Stat. 468, 58 Stat. 625.

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of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act, but each such determination shall be made on the basis of the fair market value of the property at the time it is requisitioned or returned, as the case may be.³ If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145

³ This sentence was amended by Title VI of the Second War Powers Act 56 Stat. 181, so as to read as follows:

“The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act, but each such determination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment of the Constitution of the United States.”

of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. Such courts shall also have power to determine in an appropriate proceeding any questions that may arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act, regardless of the amount in controversy in any such proceeding.

“Nothing contained in this Act shall be construed—

- (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),
- (2) to impair or infringe in any manner the right of any individual to keep and bear arms, or
- (3) to authorize the requisitioning of any machinery or equipment which is in actual use in connection with any operating factory or business and which is necessary to the operation of such factory or business.

“Sec. 2. Wherever the President determines that property acquired under this Act and retained is no longer needed for the defense of the United States, he shall, if the original owner desires the property and pays the fair value thereof, return such property to the owner; but, in any event, property so acquired and retained shall, if the owner desires the property and pays the fair value thereof, be returned to the owner not later than December 31, 1943.

“Sec. 3. The President from time to time, but not less frequently than once every six months, shall transmit to the Congress a report of operations under this Act.”

* This subsection (3) was deleted by the Act of March 27, 1942, 56 Stat. 181.

"Sec. 4. The President may issue such rules and regulations and require such information as may be necessary and proper to carry out the provisions of this Act, and he may exercise any power or authority conferred on him by this Act through such department, agency, board, or officer as he shall direct or appoint."

6. Title II of the Second War Powers Act, approved March 27, 1942, 56 Stat. 177.

"Sec. 201. The Act of July 2, 1917 (40 Stat. 241), entitled 'An Act to authorize condemnation proceedings of lands for military purposes', as amended, is hereby amended by adding at the end thereof the following section:

"Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended.'"

7. Title III of the Second War Powers Act, 56 Stat. 177, 178, pertinent provisions.

“Sec. 301. Subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676), entitled ‘An Act to expedite national defense, and for other purposes’, as amended by the Act of May 31, 1941 (Public Law Numbered 89, Seventy-seventh Congress), is hereby amended to read as follows:

‘Sec. 2. (a) (1) That whenever deemed by the President of the United States to be in the best interests of the national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, construction, repair, or alteration of complete naval vessels or aircraft, or any portion thereof, including plans, spare parts, and equipment therefor, that have been or may be authorized, and also for machine tools and other similar equipment, with or without advertising or competitive bidding upon determination that the price is fair and reasonable. Deliveries of material under all orders placed pursuant to the authority of this paragraph and all other naval contracts or orders and deliveries of material under all Army contracts or orders shall, in the discretion of the President, take priority over all deliveries for private account or for export: * * *

‘(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

‘(A) Contracts or orders for the government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled “An Act to promote the defense of the United States”;

‘(B) Contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States;

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(C) Subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this subsection (a).

Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order; and the President may require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority. Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The Executive Orders.
(In Chronological Order)

**1. Executive Order No. 8629, dated January 7, 1941,
6 Fed. Reg. 191, pertinent provisions.**

**"ESTABLISHING THE OFFICE OF PRODUCTION MANAGEMENT IN
THE EXECUTIVE OFFICE OF THE PRESIDENT AND DE-
FINING ITS FUNCTIONS AND DUTIES.**

"1. There shall be in the Office for Emergency Management of the Executive Office of the President, an Office of Production Management which shall consist of (1) a Director General, and (2) an Associate Director General, each to be appointed by the President, (3) The Secretary of War, and (4) the Secretary of the Navy.

"2. With such advice and assistance as it may require from other departments and agencies of the Federal Government, and subject to such regulations or directions as the President may from time to time prescribe, and subject further to the general policy that the Departments of War and Navy and other departments and agencies of the Government will be utilized to the maximum extent compatible with efficiency, the Office of Production Management shall:

a. Formulate and execute in the public interest all measures needful and appropriate in order (1) to increase, accelerate, and regulate the production and supply of materials, articles and equipment and the provision of emergency plant facilities and services required for the national defense, and (2) to insure effective coordination of those activities of the several departments, corporations, and other agencies of the Government which are directly concerned therewith.

b. Survey, analyze, and summarize for purposes of coordination the stated requirements of the War and Navy and other departments and agencies of the Government, and of foreign governments for materials, articles, and equipment needed for defense.

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c. Advise with respect to the plans and schedules of the various departments and agencies for the purchase of materials, articles, and equipment required for defense, to coordinate the placement of major defense orders and contracts and to keep the informed of the progress of the various programs of production and supply.

d. Plan and take all lawful steps necessary to assure the provision of an adequate supply of raw materials essential to the production of finished products needed for defense.

e. Formulate plans for the mobilization for defense of the production facilities of the Nation, and to take all lawful action necessary to carry out such plans.

f. Determine the adequacy of existing production facilities and to assure their maximum use; and, when necessary, to stimulate and plan the creation of such additional facilities and sources of production and supply as may be essential to increase and expedite defense production.

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h. Perform the functions and exercise the authorities vested in the President by Section 9 of the Selective Training and Service Act of 1940:

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"5. There shall be within the Office of Production Management a Priorities Board composed of six members. A chairman and three other members shall be appointed or designated by the President; the Director General and Associate Director General shall be members, ex officio. The Priorities Board shall serve as an advisory body and from time to time as may be required by the Office of Production Management, shall make findings and submit recommendations with respect to the establishment of priorities, the placing of mandatory orders, the assignment of preference ratings, the allocation of deliveries, and other related matters. In making its findings and recommendations, the Priorities Board shall take into account general social and economic considerations and the effect the proposed actions would have upon the civilian population."

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**2. Executive Order No. 8875, dated August 28, 1941,
6 Fed. Reg. 4483, pertinent provisions.**

"DELEGATION AND COORDINATION OF PRIORITY AUTHORITY

"1. The Office of Production Management, in addition to the responsibilities and duties described in paragraph 2 of Executive Order No. 8629 of January 7, 1941, is authorized and directed to discharge and perform the following responsibilities and duties, subject to such policies or regulations as the Supply Priorities and Allocations Board, hereinafter described, may from time to time determine:

a. Serve as the coordinating center for the execution of the powers and activities of the several departments and agencies relating to priorities; in this connection, review, clear, and approve for execution all requests or proposals originating from other Federal agencies, private industry, or other sources for priority action with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities; issue or provide for the issuance of all priority orders, warrants, certificates, or ratings with respect to the supply, production, transmission, or transportation of materials, articles, power, fuel, and other commodities; and, with reference to specific priority authorities vested by law in established departments and agencies of the Government certify to such departments and agencies, when the Office of Production Management deems such action necessary to national defense, that preferential treatment is essential for certain materials, commodities, facilities, or services.

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"2. The Office of Production Management may exercise the powers, authorities, or discretion conferred upon it by this Order through such officials and in such manner as it may determine, subject to such policies or regulations as the Supply Priorities and Allocations Board may from time to time determine.

"3. In order to assure unity of policy and coordinated consideration of all relevant factors involved in the supply

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and allocation of materials and commodities among the various phases of the defense program and competing civilian demands, there is hereby established within the office for Emergency Management a Supply Priorities and Allocations Board. The Board shall consist of the Director General and Associate Director General of the Office of Production Management, the Secretary of War, the Secretary of the Navy, the Special Assistant to the President supervising the defense aid program, the Administrator of the Office of Price Administration, and the Chairman of the Economic Defense Board. The Chairman of the Supply Priorities and Allocations Board shall be designated by the President from among the members of the Board. The President shall also appoint an Executive Director of the Board, who will preside in the absence of the Chairman.

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"5. Consistent with the basic defense policies of the President, the Supply Priorities and Allocations Board shall:

a. Determine the total requirements of materials and commodities needed respectively for defense, civilian, and all other purposes; establish policies for the fulfillment of such requirements, and, where necessary, make recommendations to the President relative thereto.

b. Determine policies and make regulations governing allocations and priorities with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities among military, economic defense, defense aid, civilian, and other major demands of the total defense program.

"6. The Office of Production Management through its Division of Priorities or any other of its divisions or subdivisions shall formulate general plans and programs providing for allocations and priorities with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities among military requirements, economic defense needs, total

civilian demands, defense aid needs, and other major elements of the total defense program. Such general plans and programs shall be submitted to the Supply Priorities and Allocations Board for approval or modification.

3. Executive Order No. 8942, dated November 19, 1941, 6 Fed. Reg. 5909, pertinent provisions.

"PROVIDING FOR THE ADMINISTRATION OF THE REQUISITIONING OF PROPERTY REQUIRED FOR NATIONAL DEFENSE.

"By virtue of the authority vested in me by the Constitution and the statutes of the United States, and particularly by the Act of October 10, 1940, entitled 'An Act to Authorize the President to requisition certain articles and materials for the use of the United States, and for other purposes,' and the Act of October 16, 1941, entitled 'An Act to authorize the President of the United States to requisition property required for the defense of the United States' (hereinafter referred to as the Acts), and in order to provide for the effective administration of the requisitioning of property required for the defense of the United States, it is hereby ordered:

"1. The Office of Production Management, in addition to the responsibilities and duties described in Executive Order No. 8629 of January 7, 1941, and Executive Order No. 8875 of August 28, 1941, shall, except as may otherwise be provided hereinafter, exercise the powers and authorities conferred upon the President by the Acts.

"2. Whenever the Office of Production Management determines, in accordance with the provisions of the Acts, the necessity for requisitioning property, that Office may:

a. requisition and dispose of such property on its own account; or

b. provide for the requisitioning and disposition of such property through the Department of War, the Department of the Navy, or any other department or agency of

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the Government authorized to engage in the procurement of property of the type subject to requisition under the Acts.

"3. Whenever requested by the Office of Production Management, any department or agency of the Government is hereby authorized to requisition and dispose of property in accordance with the provisions of the Acts and to make available to the Office of Production Management such personnel, including officers of the armed services, as may be necessary to enable that Office to carry out its functions under this Order. The United States Marshals also are hereby authorized and directed, when requested by, and in accordance with directions of the Office of Production Management or the head of any department or agency of the Government authorized to requisition property pursuant to this Order, to requisition and dispose of property.

"4. The Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of Agriculture, the Chairman of the United States Maritime Commission, the Executive Director of the Economic Defense Board, or the head of such other agency as the President may from time to time designate, may initiate action for the requisitioning of property by submitting proposals for the requisitioning and disposal of such property to the Office of Production Management, whenever he determines that:

a. such property is of the type which may be requisitioned under either of the Acts;

b. with respect to proposals for requisitioning property under the Act of October 16, 1941:

(1) the use of such property is needed for the defense of the United States, -

(2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply,

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(3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted,

(4) if the property to be requisitioned is machinery or equipment, such machinery or equipment is not in actual use in connection with any operating factory or business or is not necessary to the operation of such factory or business, and

(5) the property to be requisitioned is not a firearm possessed by an individual for his personal protection or sport, the possession of which is not prohibited by existing law;

c. with respect to proposal to requisition property under the Act of October 10, 1940, there exists a necessity for requisitioning the property in accordance with the provisions of section 1 of the Act.

The head of any department or agency acting pursuant to the provisions of this paragraph shall be authorized to requisition and dispose of such property, provided that the Office of Production Management determines that the proposed requisitioning and disposal of such property is consistent with the priorities and allocations program and the general production and supply plan of the Office of Production Management.

“5. The Office of Production Management or the head of any department or agency which requisitions property pursuant to this Order shall determine the amount of the fair and just compensation to be paid for any property requisitioned pursuant to the Acts, and the fair value of any property returned in accordance with section 2 of the Act of October 16, 1941.”

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4. Executive Order No. 9024, dated January 16, 1942, 7 Fed. Reg. 329, pertinent provisions.

"ESTABLISHING THE WAR PRODUCTION BOARD IN THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING ITS FUNCTIONS AND DUTIES.

"1. There is established within the Office for Emergency Management of the Executive Office of the President a War Production Board, hereinafter referred to as the Board. The Board shall consist of a Chairman, to be appointed by the President, the Secretary of War, the Secretary of the Navy, the Federal Loan Administrator, the Director General and the Associate Director General of the Office of Production Management, the Administrator of the Office of Price Administration, the Chairman of the Board of Economic Warfare, and the Special Assistant to the President supervising the defense aid program.

"2. The Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

a. Exercise general direction over the war procurement and production program.

b. Determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production, including purchasing, contracting specifications and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect thereto as he may deem necessary or appropriate.

c. Perform the functions and exercise the powers vested in the Supply Priorities and Allocations Board by Executive Order No. 8875 of August 28, 1941.

* * * * *

"3. Federal departments, establishments, and agencies shall comply with the policies, plans, methods and procedures in respect to war procurement and production as

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determined by the Chairman; and shall furnish to the Chairman such information relating to war procurement and production as he may deem necessary for the performance of his duties.

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"5. The Chairman may exercise the powers, authority, and discretion conferred upon him by this Order through such officials or agencies and in such manner as he may determine; and his decisions shall be final.

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"7. The Supply Priorities and Allocations Board established by the Executive Order of August 28, 1941 is hereby abolished, and its personnel, records and property transferred to the Board. The Executive Orders No. 8629 of January 7, 1941, No. 8875 of August 28, 1941, No. 8891 of September 4, 1941, No. 8942 of November 19, 1941, No. 9001 of December 27, 1941 and No. 9023 of January 14, 1942 are hereby amended accordingly, and any provisions of these or other pertinent Executive Orders conflicting with this Order are hereby superseded."

5. Executive Order No. 9040, dated January 24, 1942, 7 Fed. Reg. 527, pertinent provisions.

"DEFINING ADDITIONAL FUNCTIONS AND DUTIES OF THE WAR PRODUCTION BOARD.

"1. In addition to the responsibilities and duties described in paragraph 2 of Executive Order No. 9024 of January 16, 1942, the Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

a. Perform the functions and exercise the powers heretofore vested in the Office of Production Management.

b. Perform the functions and exercise the powers vested in the Supply, Priorities and Allocations Board by Executive Order No. 8942 of November 19, 1941.

c. Perform the functions and exercise the authority vested in the President by Section 120 of the National Defense Act of 1916 (39 Stat. 213).

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"4. The Office of Production Management, established by Executive Order No. 8629 of January 7, 1941 is abolished and its personnel records, property and funds are transferred to the War Production Board.

"5. Executive Order No. 8629 of January 7, 1941 is rescinded and Executive Order No. 9024 of January 16, 1942 and any other Executive Orders, the provisions of which are inconsistent with the provisions of this order, are amended accordingly."

6. Executive Order No. 9125, dated April 7, 1942, 7 Fed. Reg. 2719, pertinent provisions.

"DEFINING ADDITIONAL FUNCTIONS, DUTIES AND POWERS OF THE WAR PRODUCTION BOARD AND THE OFFICE OF PRICE ADMINISTRATION.

"1. In addition to the responsibilities and duties described in Executive Order No. 9024, of January 16, 1942, and in Executive Order No. 9040 of January 24, 1942, the Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall perform the additional functions and duties, and exercise the additional powers, authority and discretion conferred upon the President of the United States by Title III of the Second War Powers Act 1942.

"2. The Chairman of the War Production Board may perform the functions and duties, and exercise the powers, authority, and discretion conferred upon him by this or any other order through such officials or agencies, including the Office of Price Administration (created by the Act of January 30, 1942, Pub. Law 421, 77th Cong., 2d Sess.), and in such manner as he may determine. In any and all such cases the decision of the Chairman of the War Production Board shall be final."

**7. Executive Order No. 9138, dated April 17, 1942,
7 Fed. Reg. 2919, pertinent provisions.**

**"PROVIDING FURTHER FOR THE ADMINISTRATION OF THE
REQUISITIONING OF PROPERTY REQUIRED FOR THE PROSE-
CUTION OF THE WAR.**

"1. In addition to the authority conferred upon the Chairman of the War Production Board and the heads of certain departments and agencies by Executive Order No. 8942 of November 19, 1941, and Executive Order No. 9040 of January 24, 1942, such officials shall exercise in the manner provided in such Executive orders the authority conferred by Title VI of the Second War Powers Act, 1942,⁵ except that the determination described in paragraph 4 b (4) of Executive Order No. 8942 shall not be required.

"2. Paragraph 4 b (4) of Executive Order No. 8942 of November 19, 1941, is hereby revoked."

⁵ See Footnote 3, p. vii above.